Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	MM Docket No. 88-400
	)	
Gonzales Broadcasting, Inc.	)	File No. BPH-870707MJ
	)	
Bolton Broadcasting, Limited	)	File No. BPH-870710MD
	)	
Voth Broadcasting Company	)	File No. BPH-870710MF
	)	
Metropolitan Management Corporation	)	File No. BPH-870710MY
	)	
Lorenzo Jelks	)	File No. BPH-870710MZ
	)	
QRW Partners Limited Partnership	)	File No. BPH-870710NF
	)	
Mableton Communications, Limited	)	File No. BPH-870710NQ

For a construction Permit for a
New FM Broadcast Station on
Channel 273A at Mableton, Georgia

To: The Commission

JOINT OPPOSITION TO MOTION OF LORENZO JELKS

The applicants identified in the caption, other than Lorenzo Jelks, hereby submit this Joint Opposition to the frivolous motion filed on behalf of Jelks seeking reinstatement of his application and use of an auction to award the Mableton FM license that is the subject of this captioned proceeding. Jelks' motion is worse than frivolous – it is an abuse of the Commission's processes. It is one thing to seek judicial review of Commission action as contemplated by the statute but it is quite another to seek to delay the initiation of service to the public through the submission of patently meritless pleadings as is the case here. Section 1.52 of the Commission's rules provides that "[t]he signature or electronic reproduction thereof by an attorney constitutes a certificate by him

that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Jelks' motion cannot support such a certificate.

ARGUMENT

The motion requests relief that is beyond the Commission's power to grant. Upon Jelks' filing of his notice of appeal of the Commission's dismissal of his application, this proceeding and his application were no longer subject to the jurisdiction of the Commission. Pursuant to Section 402(c) of the Communications Act, "[u]pon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein...." Section 1.65 of the rules, relied upon by Jelks (Motion at 3) does not hold to the contrary. That rule requires a party to keep the information in its application current, even while the application is under judicial review, and provides explicitly that [f]or the purposes of this section, an application is 'pending' before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court." (*emphasis added.*) The rule does not and, consistent with Section 402(c), could not suggest that the application would be pending for any other purpose.

Despite the clear language of the statute and the express limitation of Section 1.65, Jelks insists that "the Commission has the authority and obligation to grant this motion without regard to the pendency or disposition of the Petition for Writ of Certiorari which Jelks has filed with the United States Supreme Court." (Motion at 2, n. 1.) The only case cited by Jelks in support of this proposition, *Croswait v. FCC*, 584 F.2d 550

(D.C. Cir. 1978), is completely inapposite. That case involved a remand by the court to the Commission for further proceedings, not independent Commission action with respect to a case that is actively before the courts and not subject to a remand order. *Croswait*, obviously, offers no support for the action Jelks requests here.

Notwithstanding Jelks' bold assertion quoted above, the law in this area has long been settled and contradicts Jelks' position. In *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1968), *cert. denied sub nom., WHDH, Inc. v. FCC* 406 U.S. 950 (1972), the learned Judge Harold Leventhal succinctly stated the law: "[o]nce a petition to review has been filed in court, the FCC has no authority to conduct further proceedings without the court's approval. The reviewing court must order a remand if there is to be provision for further administrative consideration." 463 F.2d at 283 (citations omitted). *Accord, Exxon Corporation v. Train*, 554 F.2d 1310; 1316 (5th Cir. 1977). Here Jelks concedes that he already has asked the court for a remand so that his application might be reinstated and permitted to participate in an auction but that request, opposed by the Commission and the Intervenors, was denied. (Motion at 5.)

Although the foregoing is dispositive of this Motion, very brief consideration of Jelks' other contentions may be in order. Jelks argues that his application should be reinstated *nunc pro tunc* because "exceptional public interest considerations" or his "substantial equities" warrant such action. (Motion at 6, citing *Mobile Telecommunications Corp.*, 49 RR 2d 1506, 1511-12 (1981).)

The Motion, however, states only that it would be unfair to Jelks "to preclude his participation in an auction because of an alleged failure to comply with a policy that is no longer deemed necessary." (Motion at 6.) Jelks seemingly and conveniently refuses to

recognize that there is no auction for the Mableton frequency, hence no exclusion. He, moreover, had an opportunity to participate in the settlement along with all of the other applicants but chose instead to pursue his application even though both the ALJ and the Review Board had ruled against him. Both the Commission and the court have upheld his disqualification against all arguments he could muster. Having made his choice, it certainly is not unfair to hold him to it.

To the contrary, granting him relief as requested would be most unfair to the settling applicants who have acted in good faith in accordance with the policies of the Commission and Congress encouraging settlements in these old, heavily litigated cases. If equities are to be weighed, theirs far outweigh those (if any) of Jelks[1].

CONCLUSION

This case must now come to an end. Jelks has used every means at his disposal to delay the activation of this station. He began with a long-shot appeal followed by a frivolous motion for rehearing and suggestion for rehearing *en banc*, and then by an equally frivolous request for remand. Jelks topped this off with a petition for certiorari so meritless that both the Comission and the Intervenors have waived the right to file opposing pleadings. And now we are confronted with the instant wholly improper motion. The Supreme Court is expected to consider Jelks' petition shortly and an order denying certiorari certainly will be forthcoming. At that point Jelks' application will be

[1] Jelks' attempt to distinguish the Commission's recent decision in *Heidi Damsky*, FCC 98-342 (January 6, 1999) is futile. The fact that the settlement here occurred before the Congressionally mandated 120 day settlement period is irrelevant. Nor has Jelks' explained the legal significance of the fact that some of the Mableton settling parties had unresolved qualifications issues. Their equities arise from the fact that they are parties to a Commission-approved settlement as were the settling parties in *Damsky*. .

no more and the Commission should expeditiously and appropriately bring an end to this farce and dismiss this Motion as moot.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 1999, copies of the foregoing Joint Opposition to Motion of Lorenzo Jelks were sent by first-class mail, postage prepaid, to the following parties:

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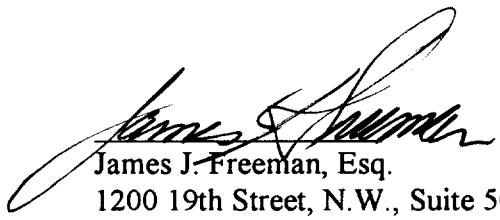

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